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Office of Administrative Law Judges
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Issue Date: 14 March 2003

In the Matter of:

DAMASO GONZALEZ,
Claimant

v.

SUN TERMINALS, INC.,
Employer

and

FREEMONT INDUSTRIAL,
Carrier

Case No. 2000-LHC-1801
OWCP No. 6-176502

Appearances:

David C. Barnett, Esq.
Barnett & Lerner, P.A.
Dania Beach, Florida
For the Claimant

Lawrance B. Craig, III, Esq.
Frank Sioli, Esq.
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Miami, Florida
For the Employer/Carrier

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act"), 33 U.S.C. § 901, et seq., and implementing regulations found at 20 CFR Part 702, brought by the Claimant, Damaso Gonzalez, against his Employer, Sun Terminals, Inc., and its Carrier, Freemont Industrial. The Act provides for payment of medical expenses and compensation for disability or death of an employee injured on navigable waters of the United

States or adjoining areas. In this case, Gonzalez alleges that he was permanently disabled by an injury to his shoulder on May 21, 1998.

I conducted a hearing on this claim on July 26, 2001, in Fort Lauderdale, Florida. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Claimant's Exhibits ("CX") 1-5 and Employer/Carrier's Exhibits ("EX") 1-19 were admitted into evidence without objection. Several of the Employer/Carrier's exhibits were re-designated as Joint Exhibits ("JX") but retained the same numbers as assigned by the Employer/Carrier. Transcript ("Tr.") at 7-18.[1] An interpreter assisted at the hearing because Gonzalez does not speak English. The record was held open after the hearing to allow the Employer/Carrier to submit missing pages from EX 5, 9 and 19, and for the parties to submit closing arguments. By submission received September 25, 2001, the Employer/Carrier submitted the missing pages from EX 5 and 9, copies of which have been added to the exhibits. The Employer/Carrier could not locate Gonzalez' paycheck from his new employer, El Cantro Outlet, admitted as EX 19, which was to be copied and re-submitted after the hearing.[2] The parties submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

STATEMENT OF THE CASE

Gonzalez injured his shoulder on May 21, 1998. Although he returned to work at first, he was unable to continue and had to stop working to undergo surgery. Initially while he underwent examinations and treatment, Fremont paid his medical expenses and compensation for temporary total disability. Eventually, on August 18, 1999, Fremont terminated the payment of compensation. As the parties were unable to resolve their differences before the Department of Labor Office of Workers' Compensation Programs ("OWCP"), the case was referred to the Office of Administrative Law Judges for hearing.

Gonzalez contends that he did not reach maximum medical improvement until April 9, 2001, so that his temporary total compensation benefits were terminated prematurely in August

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[1]Some of the Joint Exhibits contained duplicate pages and were not in chronological order. I have removed duplicate pages and re-ordered the pages chronologically.

[2]Upon review of the file, I discovered that additional exhibits were missing from the record, including some surveillance photographs, EX 1 D-O; the report of an MRI taken in late August 1998, part of EX 15 (which was intended to include all MRI's); and Claimant's Answers to Employer/Carrier's Request for Admissions, EX 18. On February 6, 2003, I issued a notice to the parties that the exhibits were missing and gave them two weeks to submit them. The parties have not submitted any of the missing exhibits.

1999. He also contends that the average weekly wages calculated by the Employer/Carrier were too low, improperly reducing his benefits. Finally, he argues that the Employer/Carrier failed to establish the availability of suitable alternative work, and that he has suffered permanent total or partial disability for which he is entitled to additional compensation. He seeks temporary total disability compensation up to April 2001, at a higher rate than he actually received, and permanent total or permanent partial disability thereafter.

The Employer/Carrier concedes that Gonzalez suffered a loss of earning capacity. It contends, however, that Gonzalez reached maximum medical improvement by February 24, 1999. It also argues that it correctly calculated Gonzalez' average weekly wage. It argues that Gonzalez' complaints of pain and limitations in his use of his right shoulder are exaggerated and inconsistent with his daily activities. Finally, it contends that it has established the existence of suitable alternative employment, and that Gonzalez' loss of wage earning capacity is less severe than he claims.

ISSUES

The issues before me are:

1. When Gonzalez reached maximum medical improvement.

2. Gonzalez' pre-injury average weekly wages.

3. Whether the Employer/Carrier has established that there is suitable alternative employment for Gonzalez.

4. Gonzalez' lost wage earning capacity, and whether he is permanently partially disabled, or alternatively, permanently totally disabled.

Tr. 19-31; Claimant's Closing Argument Brief; Employer/Carrier's Closing Brief. In his pre-hearing statement, counsel for Gonzalez alleged that there were outstanding medical expenses which had not been paid by the Fremont. He did not raise the issue of medical expenses at the hearing, or in his post-hearing brief, so I have not addressed past medical expenses in this decision. Although the Employer/Carrier initially contended that it was entitled to special fund relief pursuant to Section 8(f) of the Act, 33 U.S.C. § 908(f), that issue was withdrawn at hearing. Tr. at 6.

APPLICABLE STANDARDS

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability

is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Insurance Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized, *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981) (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89, 91 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986). A doctor's opinion that return to the employee's usual work would aggravate his condition may support a finding of total disability. *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job).

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement, even if the jobs are no longer available at the time of the survey. *New Port News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping*

Co., Inc., 25 BRBS 294, 296 (1992). An employer may also establish suitable alternative employment by offering the claimant a position within its facility so long as it does not constitute sheltered employment. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171, 172 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Compensation for total or partial disability is based on "average weekly wages." *See* 33 U.S.C. §§ 908 and 910. Compensation for partial disability is based on the difference between the claimant's pre-injury average weekly wage and post-injury wage earning capacity. The factors to be considered in determining wage earning capacity are set forth by Section 8(h) of the Act, 33 U.S.C. § 908(h). The methods for determining the applicable average weekly wage and wage earning capacity are addressed below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Admissions

The Employer/Carrier made the following Admissions:

1. Damaso Gonzalez was employed by Sun Terminals, Inc. on or about June 21, 1998.

2. Sun Terminals, Inc. provides repairs and/or services for maritime vessels.

3. Mr. Gonzalez was engaged in traditional maritime employment at the time of his injury and is covered under the *Longshore and Harbor Workers/ Compensation Act*.

4. Mr. Gonzalez sustained injury to his right shoulder during and within the scope of his employment with Sun Terminals, Inc.

5. Sun Terminal, Inc./Fremont Industrial Indemnity requested an independent medical examination of Mr. Gonzalez with Dr. Orestes Rosabal in February 1999.

6. As a result of the employer/carrier's IME, Sun Terminals, Inc./Fremont Industrial Indemnity suspended all indemnity benefits.

7. Mr. Gonzalez requested further treatment for his injured right shoulder with neurologist Dr. Jose Munoz an orthopedic shoulder surgeon.

8. On April 24, 2000, Sun Terminals, Inc./Fremont Industrial Indemnity denied Mr. Gonzalez authorization for any further medical treatment to his right shoulder.

9. Dr. Moya is the claimant's authorized treating physician.

See Employer/Carrier's Response to Request for Admissions, CX 5. I make no findings as to any

admissions by the Claimant because although his responses were listed as an exhibit, EX 18, they were omitted from the record. *See* note 2 above.

The Employer/Carrier's admissions are conclusively established as there has been no motion to withdraw or amend them. *See* 20 CFR § 18.20(d). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here.

Summary of the Evidence

Gonzalez was deposed twice during the proceedings in this case, on September 7, 1999, EX 7, and on July 9, 2001, EX 16. He also testified at the hearing. Gonzalez was born in Havana, Cuba, in 1945. He attended primary school in Cuba through the fourth or fifth grade. He is able to speak and read Spanish, and write Spanish with difficulty. He does not speak, read or write English. While in Cuba, Gonzalez worked in kitchens, the Port of Havana, and a tire factory, and made deliveries on a motorcycle. He also served in the military from 1964 to 1967. He never had any accidents or injuries involving his right arm or shoulder in Cuba. He came to the United States in 1980. Since then he has lived in Miami, Florida, and is authorized to work as a resident alien. In the United States, Gonzalez worked repairing flat tires for a car rental company, and then as a laborer at the Port of Miami. His primary work has been repairing and putting together the bodies of containers, using hammers, sledge hammers and hand jacks to straighten walls and ceilings of the containers, and welding.

Gonzalez was employed by Sun Terminals for two to two-and-a half years before his injury. He usually worked about 40 hours per week. His normal hours were from 7:30 a.m. to 4:00 to 4:30 p.m., receiving $11.00 per hour. He received time-and-a-half for overtime which he worked when needed, but he did not like to work overtime. He testified that he was laid off twice, once for three months, and once for five months, in two separate years, during which periods he received unemployment compensation. On cross examination he said he expected to go back to work at Sun Terminals, but he did look for work during the layoffs. According to his tax returns and W-2's, he earned $23, 255.65 from Sun Terminals in 1996, $16,662.00 from Sun Terminals and $3,346.00 from unemployment compensation in 1997, and $10,582.00 from Sun Terminals in 1998. CX 4; JX 3.

On May 21, 1998, Gonzalez was repairing a damaged container roof. While hammering dents with a sledgehammer above his head, he experienced pain in his right shoulder. He notified his supervisor and went to the clinic used by the insurance companies (Sunshine Medical Center in Port Everglades). A few days later he returned to work. He was unable to continue due to the pain in his shoulder. He received injections and physical therapy for about two months. In July 1998 he was referred to a specialist. Gonzalez' physician of choice was Dr. Roberto Moya, who diagnosed a right shoulder rotator cuff tear and recommended an MRI to confirm the diagnosis. Gonzalez underwent an independent medical examination by Dr. Orestes Rosabal, who authorized the MRI in August 1998. The Employer/Carrier authorized surgery to repair the shoulder, which

Dr. Moya performed in September 1998. Dr. Moya continued to care for Gonzalez thereafter. After a second independent medical examination in February 1999, Dr. Rosabal concluded that Gonzalez had reached maximum medical improvement. Dr. Moya, on the other hand, concluded that Gonzalez did not reach maximum medical improvement until March 2000. The medical evidence is discussed separately below. It indicates that Gonzalez' shoulder improved for a time after the surgery, but then began to deteriorate.

Michelle Worgull, an adjuster assigned to handle Gonzalez' claim by the Carrier, was deposed by telephone on May 17, 2001. CX 3. Gonzalez received compensation for temporary total disability for the period from May 29, 1998, when he began missing time from work, through August 17, 1999, based on an average weekly wage of $317.37, resulting in biweekly checks to Gonzalez in the amount of $423.86. CX 3; EX 2. The Carrier never paid temporary partial benefits because it concluded that Dr. Rosabal had issued a full duty release. CX 3. Gonzalez continued to be off work thereafter until two weeks before the hearing in July 2001.

The Employer/Carrier introduced video and still surveillance pictures taken by a private investigator, Robert Chamblin, at their request. EX 1. On June 11, 1999, he filmed and took still photographs of Gonzalez fishing with a fishing rod and a hand line, using his right arm above his shoulder. On cross examination, Gonzalez agreed that when he was deposed in September 1999 he said he had not been fishing since his accident. When asked if he appeared in pictures of a man fishing in June 1999, EX 1D, E, F, G, Gonzalez said he did not know if he appeared in the picture, and he did not recall whether he went fishing in June 1999, but he recognized the location as a park he used to go to. On November 30, 1999, Chamblin took pictures of Gonzalez checking fluid levels and putting fluid in his van engine, using his right hand. Gonzalez confirmed that he was the person squatting by the front right tire of his van, reaching into the van, and holding a water jug in pictures taken in November 1999, EX 1J, K, L, M, N. During the September 1999 deposition, he said he was able to drive without difficulty. At the hearing, he said he can drive the van with difficulty, using his left hand. On re-direct examination, he denied doing any mechanical work on his van. Chamblin testified that on June 11, 1999, he observed Gonzalez driving the van with his left arm out the window, driving with the right hand. On cross examination, Chamblin testified that he conducted surveillance in 2000 and 2001, and admitted that the 1999 video was the most demonstrative he had showing Gonzalez using his right arm. Thus the surveillance evidence supports my conclusion that Gonzalez' shoulder improved immediately following surgery, but later deteriorated.

Claire Lange, a vocational expert, was retained by the Employer/Carrier to conduct a vocational evaluation of Gonzalez in May 1999. That evaluation never took place as she was told by counsel for the Employer/Carrier that counsel for Gonzalez needed further medical reports first. Lange conducted a labor market survey in January 2001, and concluded that Gonzalez had lost wage earning capacity, but there were jobs he could do. Her testimony is discussed in more detail below.

John Williams, a vocational expert retained by the Claimant, concluded that there were not

a statistically significant number of jobs Gonzalez could do. He thought Gonzalez would be unable to perform consistently over time and that he was probably permanently disabled from full-time sustained employment. His testimony is also discussed in more detail below.

Nadia Cross, Human Resource Manager and Comptroller for Sun Terminals, was designated as a representative of the Employer, and is the payroll custodian. She was deposed in both capacities. CX 2a and CX 2b. She did not know Mr. Gonzalez and had not handled his claim. She testified from company records. She stated that he was first hired in 1995, at $10.50 per hour for a three-month probationary period, after which his rate was raised to $11.00 per hour. He was laid off for economic reasons July 11, 1996. Records available to Cross between July 1996 and December 1997 were incomplete, so her testimony was a bit confusing. I infer from her testimony, Gonzales' testimony and Gonzales' 1996 and 1997 earnings that Gonzalez was recalled sometime in 1996 after about a three-month layoff, and that he then continued to work into 1997, until another five-month layoff occurred. Gonzalez was rehired a second time on December 3, 1997. The business where he worked operated five days a week. Gonzalez was expected to work 42.5 regular hours per week, from 7:30 to 4:00 each day (with paid breaks), and whatever other overtime was required, which was paid at $16.50 per hour. He was also entitled to two weeks of vacation after one to five years of employment. Gonzalez' time and pay records for December 1997 to June 1998 are found in JX 3, and show that he usually worked 40 hours or less each week. He only earned overtime for the three weeks ending May 12, May 19 and May 26, 1998. After Gonzalez was injured, the company never offered him light duty work, and Gonzalez never requested it.

At the hearing, Gonzalez testified it is his understanding from his doctors that his shoulder has gotten worse. He said he has problems with eating, shaving, combing his hair, and putting on a pullover sweater. He said he has throbbing pain especially when his arm is down at his side. He feels better when it is resting on a table. He feels the pain when it is humid or cold, or if he carries a gallon of milk with his right hand. He could not lift a gallon of milk over his head. He said Dr. Moya gave him a ten-pound restriction. On cross examination, he said Dr. Rosabal told him he could go back to work with restrictions, but he did not attempt to work. When he was living alone, he did all his cooking. At the time of the hearing, he was living with a companion and her relatives, and said he helped around the house using his left hand.

When he was deposed in 1999, Gonzalez said he had not looked for work because he would not be able to do it. At hearing, Gonzalez said he did not work in 2000 or 2001. On direct examination he said he had been looking for work, but he was not offered any, and Sun Terminals had not offered him any work. On cross examination, he said he made no efforts to find work in 1998, 1999 or 2000. In 2001, he made five calls for jobs driving cars, but one required making deliveries, which he could not do. He said he also called three or four of the jobs on a list that Lange had given him ten to twenty days later. He said Williams did not give him any job opportunities. He also volunteered that he had started work about two weeks before the hearing doing surveillance in a retail store to which his companion referred him, earning $180.00 per week.

Medical Evidence

Gonzalez was referred to the Sunshine Medical Center on May 21, 1998. X-ray revealed no fracture, and degenerative disease of the acromioclavicular joint. The diagnosis was a right shoulder sprain, and he was referred for physical therapy. Although Gonzalez initially reported some improvement with therapy and medication, he continued to have pain and tenderness. At the end of June, the Carrier authorized him to see an orthopedist. While he was under treatment at Sunshine Medical Center, he was cleared for light duty, if available, with no lifting over 10 pounds or excessive reaching with his right arm. By early June, a restriction from using his right arm and shoulder was added. JX 10. Payroll records indicate that Gonzalez last worked May 28, 1998, after which he was on sick leave and then workers' compensation. JX 3.

Dr. Roberto Andres Moya Fiallo is a board certified orthopedic surgeon. Dr. Moya first saw Gonzalez on July 21, 1998. His initial impression was a possible rotator cuff tear. He ordered an MRI. The MRI showed a complete tear of the supraspinatus tendon which was related to the injury, and a preexisting condition, hypertrophy of the acromioclavicular joint, which was not related to the injury. JX 6; JX 11.

The Carrier referred Gonzalez to Dr. Orestes Rosabal, an orthopedic surgeon, for an independent medical examination on August 17, 1998. In making the referral, the Carrier's representative stated that Gonzalez had been off work since May 30, 1998, as no modified work had been available. Dr. Rosabal's impression was a complete tear of the rotator cuff in the right shoulder. Dr. Rosabal concurred that as Gonzalez failed to improve with conservative treatment, he was a candidate for surgery. Dr. Rosabal stated that Gonzalez was not at maximum medical improvement, and it was too early to determine whether he would have a permanent impairment. JX 9.

Dr. Moya performed surgery to repair the tendon on September 18, 1998. As part of that surgery, he debrided the subacromial region (the area of preexisting arthritis), giving more room to repair the tendon. The aim of the surgery was to decrease pain and increase the range of motion of the shoulder. JX 6; JX 11; JX 13.

Dr. Rosabal examined Gonzalez a second time on February 24, 1999. Dr. Rosabal reported he had been sent medical records for review, including a follow-up report by Dr. Moya dated December 1, 1998.[3] Gonzalez reported that he was much improved from before the

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[3]In that report, JX 11, Dr. Moya stated,

> He is going to require further therapy and he will probably be MMI'd in another two months or six to eight weeks. At this time, I believe the patient can do light duty work . . . He should not lift more than 20 lbs. No repetitive motion with the right upper extremity or shoulder. . . .

surgery, but not to the point he could return to working on containers. There was limitation of movement to 150 degrees of flexion and abduction actively and passively, and 80 degrees of external rotation. He lacked about 5 degrees of internal rotation as compared to the left side. His backward extension was normal. He had a mildly positive impingement sign. X-rays revealed an anchor. The acromial humeral distance was normal. Dr. Rosabal's impression was status post decompression and repair of a rotator cuff tear of the right shoulder. In the Comment section of his report, Dr. Rosabal stated:

> In my view this patient is at maximum medical improvement. I believe he has a three percent physical impairment of the body as whole according to the Florida Impairment Rating Guide. Regarding his return to work, I would suggest that he have a functional capacity evaluation done and compare it to a job analysis of his job as a mechanic welder. Based on that information his work status can be determined and whether he will be able to return to his previous line of work can also be determined.

JX 9.

By letter dated March 19, 1999, the Carrier asked Dr. Moya whether he concurred with Dr. Rosabal's evaluation. Instead of signing the letter to indicate his concurrence as requested, Dr. Moya wrote "Except to the IR which I believe is 5% IR"; he also indicated that he believed that Gonzalez needed further medical treatment. JX 11.

In a letter to counsel for the Employer/Carrier dated April 26, 1999, Dr. Rosabal stated:

> This letter is in answer to the questions that you had at our conference on 4/26/99. This patient upon conversion to AMA guidelines has a two percent physical impairment of the body as a whole. Based on his objective physical findings on 2/24/99, I see no reason the patient can not attempt his regular duty as a mechanic welder. Based on the patient's subjective complaints he was not feeling capable of accomplishing the work of a mechanic welder, and I would restrict him to no repetitive lifting or reaching with the right upper extremity based on those subjective complaints.
>
> As of 2/24/99, I did not feel that any further treatment was necessary for this patient and I was not anticipating any future treatments. I also, upon reviewing his previous reports feel that the injury that occurred on 5/21/98 was consistent with his original diagnosis.
>
> If you choose to send this patient for a functional capacity evaluation, I will send you a separate letter with a list of several companies that perform this function.

JX 9.

Dr. Moya saw Gonzalez in follow-up to the surgery until April 20, 1999. According to Dr. Moya's April 20 note, Gonzalez reported

> a continuous ache, a nagging discomfort that he states he does not have to take narcotics for the pain but he has to modify his activities, and he does not feel that he is able to carry on his job as a soldering expert in mechanics being right-handed and being that his right shoulder is affected.

Upon examination, Dr. Moya reported external rotation of 45 degrees, forward flexion of 90 degrees, and overhead extension of 150 degrees. Dr. Moya, too, recommended a functional capacity evaluation, and that Gonzalez return for reevaluation in six to eight weeks. JX 11. No functional capacity evaluation was ever performed.

The adjuster for the Carrier testified that indemnity was paid to Gonzalez for temporary total disability benefits from May 29, 1998 through August 17, 1999. Benefits were stopped based on Dr. Rosabal's letter indicating there was no objective reason Gonzalez could not return to his job. CX 3. However, based on the limitations Dr. Rosabal imposed for subjective symptoms, later supported by objective evidence of deterioration in the shoulder, Dr. Moya's opinion that Gonzalez needed further treatment, and the recommendations by both Dr. Rosabal and Dr. Moya that a functional evaluation should be given, I conclude that the Carrier should not have stopped paying compensation to Gonzalez at that time.

Gonzalez returned to Dr. Moya on January 11, 2000, reporting a lot of pain which was getting unbearable, and weakness to the right upper extremity that prevented him from doing his former job. When Dr. Moya saw him, he had excellent range of motion, but with pain. There was some effusion in the joint. X-ray showed the anchor attaching the tendon to be in place. Dr. Moya sought authorization for an MRI. On February 8, 2000, Gonzalez was complaining of pain such that "Anything he does that requires motion of the shoulder increases pain to the point that it renders him incapable of doing anything else." Dr. Moya's impression was postoperative ankylosis with right shoulder tendinitis, pain and synovitis. Injection did not help much. Dr. Moya recommended further therapy and was still awaiting an MRI. JX 11.

On February 15, 2000, Gonzalez saw Dr. Jose Antonio Munoz for a neurological consultation. On neurological examination, there was no significant focal motor weakness and strength, sensation and reflexes were bilaterally symmetrical and equal. Dr. Munoz ordered a CT scan instead of MRI because of the metal in Gonzalez' shoulder. The CT scan was taken on February 17, 2000. The impression of the radiologist was calcific tendinitis. Dr. Munoz saw Gonzalez in follow-up on February 28. His diagnosis was right shoulder trauma with surgery, with pain due to probable rotator cuff problem and tendinitis. Dr. Munoz recommended further follow-up with the orthopedic surgeon. JX 12. Dr. Munoz was not authorized to provide further treatment by the Employer/Carrier. CX 3.

Dr. Moya next saw Gonzalez on March 14, 2000, and then was deposed by the Employer/Carrier on August 11, 2000. Dr. Moya said that the CT scan taken on February 17 showed calcification of the tendon and mild degenerative changes of the glenohumeral joint and AC joint. The calcific deposit would cause more impingement in the joint. Early mild arthritic

changes in the glenohumeral joint suggested posttraumatic arthritis, i.e., that the shoulder was deteriorating. Gonzalez reported that he was having difficulty doing anything with his dominant right upper extremity, including driving or picking up a gallon of milk. Neurovascular status was normal, ruling out other problems related to the arm. Dr. Moya did not recall whether Gonzalez had any atrophy. He thought that a functional capacity evaluation was important, and an orthopedic surgical evaluation. Dr. Moya had stopped performing surgery in November 1998 due to an injury he had suffered, so he referred Gonzalez to another surgeon. The indications for further surgery were pain, crepitation and positive impingement signs of pain with motion of the arm, which were objective findings. Dr. Moya prescribed Vicodin for the pain, and told Gonzalez not to drive or work around machinery when he was taking it. Dr. Moya said Gonzalez would be able to do minimal lifting with his right hand, less than five pounds occasionally, not frequently. JX 6, JX 11, JX 12.

Dr. Moya testified that over the time he treated Gonzalez, Gonzalez made substantial improvement. When Dr. Moya first saw him, he was only able to lift his arm to the side 35 degrees. When he last saw Gonzalez on March 14, 2000, he was able to extend the arm to 150 degrees, normal being 180 degrees. Dr. Moya was unable to say when Gonzalez reached maximal medical improvement, as his original prediction was not confirmed by an examination, and when he saw Gonzalez in April 1999, he was not at MMI. He said that from a medical point of view, Gonzalez would be needing treatment "off and on for the rest of his life . . . And probably surgery again . . ." Deposition at 16. He disagreed with Dr. Rosabal's report, as Dr. Rosabal had given an impairment rating of only 3%. He only gave the 5 % rating, which he viewed as a minimum, because he was asked whether he agreed with Dr. Rosabal's report, not because he determined that Gonzalez was at maximum medical improvement. He did not believe that Gonzalez had reached maximum medical improvement at the time he was deposed, although he said that but for the recommended surgery, Gonzalez would have been at maximum medical improvement as of the examination of March 14, 2000. Without the surgery, his impairment remained at five to six percent of the body as a whole based on the AMA guidelines as a conservative estimate. He disagreed with Dr. Rosabal's opinion that Gonzalez did not need further treatment. He had given Gonzalez the names of three surgeons to consult regarding surgery. He still thought a functional capacity evaluation would be appropriate to document what Gonzalez could do. He had not thought of it himself, but agreed that a pain medicine evaluation might also be appropriate. JX 6.

Gonzalez was examined for a second opinion by Dr. Michael J. Ruddy, a board certified orthopedic surgeon, on March 22, 2001. Gonzalez reported that he had not seen any physicians or had any physical therapy for the past year. He complained of stiffness in the right shoulder, difficulty lifting, and difficulty reaching over his head and behind his back. He said the pain in his right arm interfered with his sleep. He also complained of a cracking sensation in the right shoulder. During the examination, Dr. Ruddy performed range of motion on both shoulders. Forward flexion was 155 degrees on the right, and 170 degrees on the left. Abduction was 120 degrees on the right and 180 degrees on the left. External rotation was 10 degrees on the right and 60 degrees on the left. Internal rotations on the right were also reduced when compared to the left. Gonzalez could actively abduct, forward flex and extend the arm, but could not actively

externally rotate. Dr. Ruddy observed creptiance in the subacromial region. Grip strength in his right dominant hand was 35 lbs. of pressure, and 60 lbs. on the left. There was no atrophy or loss of sensation. Reflexes were symmetrically decreased. X-ray showed a large acromial spur inferiorly, elevation of the humeral head in relationship to the acromion, decreased subacromial space, and calcification. Dr. Ruddy reviewed Gonzalez' medical records, and noted that postoperatively Gonzalez initially had been making improvement with range of motion, but then began to deteriorate. Dr. Ruddy also reviewed videotapes from June and November 1999, stating that most of Gonzalez' activity was with his left upper extremity. Dr. Ruddy diagnosed status post right shoulder open rotator cuff repair, probable recurrent tear of right rotator cuff, and calcification of rotator cuff in the right shoulder. Dr. Ruddy strongly recommended an MRI. He noted that Dr. Moya was reluctant to perform an MRI because of the metal anchor, but thought himself that the anchor would not interfere. He thought the lesion might not be repairable. He said Gonzalez could work sitting or light duties, but could not be involved in any occupation above 90 degrees of forward flexion or 90 degrees of abduction. Lifting would be limited to 20-30 pounds. JX 8.

After an MRI was administered on March 29, 2001, Dr. Ruddy saw Gonzalez again on April 9, 2001. The MRI revealed a complete torn supraspinatus and infraspinatus tendon with retraction to the glenoid labrum. There was atrophy and fatty infiltration within the bundle, and elevation of the humeral head in relationship to the acromion. In view of the combination of bad prognostic signs, Dr. Ruddy concluded that this would be considered a non-operable lesion. Dr. Ruddy recommended stretching at home, intermittent physical therapy, and annual followup in case Gonzalez developed degenerative changes in the joint. Work restrictions remained as outlined in the March 22 report. JX 8; JX 15.

Dr. Moya saw Gonzalez again on June 5, 2001. In his report, he reiterated his view articulated at the deposition that Gonzalez reached maximum medical improvement on March 14, 2000. On physical examination, range of motion was essentially unchanged. There was crepitus and pain with rotation, and slight effusion of the joint. Review of CT scan and MRI showed post-traumatic calcific rotator cuff tendinitis and arthritic changes of the glenohumeral joints. Dr. Moya stated:

> He can only do sedentary work, not lifting more than 10 pounds occasionally. He should not do any overhead work or lifting with the right upper extremity, repetitively. I do not believe he can work as a soldering expert. According to what the patient states, he was seen by an orthopedic surgeon who did not recommend further surgery and I agree with this. . . .

JX 11.

Maximum Medical Improvement

There is conflicting evidence in the record regarding when Gonzalez reached maximum

medical improvement. The Employer/Carrier relies on Dr. Rosabal's opinion that Claimant reached MMI in April 1999. Dr. Moya testified that Gonzalez reached MMI in March 2000. The Claimant suggests that due to ambiguities in Dr. Moya's statements, Dr. Ruddy's reports should be treated as determinative that April 2001 was the date of MMI. At the outset, I reject April 2001 as the date of MMI, because Dr. Ruddy himself did not offer such an opinion, and his report discloses substantial deterioration of the shoulder since Dr. Moya's examination the year before. Furthermore, Dr. Moya saw Gonzalez again after Dr. Ruddy's examination, and of all the physicians who examined the Claimant, was the only one who saw him over the entire period since his injury. In Dr. Moya's June 2001 report, he agreed that Gonzalez was not a candidate for further surgery, and reaffirmed the date of March 14, 2000 as the date of MMI in the absence of such surgery. I agree with the Claimant that the basis for Dr. Moya's opinion is not a model of clarity. Nonetheless, as of April 1999, it appears that Dr. Rosabal's opinion was based at least in part on Dr. Moya's earlier projection of expected MMI, which Dr. Moya later disavowed as a result of the continued problems Gonzalez experienced, and the need for ongoing treatment and evaluation. Thus I also reject April 1999 as the date of MMI. Based on Dr. Moya's opinion, I find that March 14, 2000, was the date Gonzalez reached maximum medical improvement.

Vocational Evidence

The Employer/Carrier relies on an evaluation by Claire Ann Lange of Lange Consulting and Development, Inc. to establish the availability of suitable alternative employment. She was deposed by the Claimant on July 10, 2001, JX 17, and she testified at the hearing. Her reports of her efforts on Gonzalez' case are found in the record at EX 5.

Lange has a Master's Degree in Vocational Rehabilitation and a provider number with the State of Florida. She is nationally certified in workers' compensation and longshore workers' rehabilitation counseling, a Certified Rehabilitation Counselor, a Certified Vocational Evaluator, a Certified Disability Management Specialist and a Certified Case Manager. She has been employed as a vocational rehabilitation counselor, a vocational counselor and a supervisor of nurses and vocational counselors since 1980. She formed her own business, Lange Consulting Development, as a vocational rehabilitation counselor in 1996. She is not certified with the American Board of Vocational Experts, the American Board of Disability Analysis or in any area of vocational re-employment, as she does not have a doctorate, nor has she published any articles or texts. She assists employers in their defense, finding work for injured employees and testifying on behalf of employers.

Lange was initially retained to undertake a vocational evaluation for Gonzalez in late May 1999, but she was told by counsel for the Employer/Carrier that Gonzalez' counsel declined to participate because Gonzalez was undergoing additional treatment, and she was never able to perform the evaluation. In the meantime, she had reviewed the medical reports up to April 1999 and Gonzalez' deposition taken September 7, 1999. In January 2001 she undertook a labor market survey. She performed a transferrable skills analysis by entering Gonzalez' work history and physical limitations in a computer with Dictionary of Occupational Title codes, using OASIS

to identify 35 unskilled and semi-skilled occupations involving assembly, fabrication and repair, transportation, production work and electronic assembly. She then contacted potential employers or their representatives to discuss Gonzalez' background, skills and limitations, including the fact that he speaks Spanish but not English. She identified available positions within Gonzalez' limitations and provided contact information for seven different employers, including unskilled assembler positions with Boston Scientific Symbiosis through Team Concepts for $7-7.50 per hour; unskilled assemblers with Cordis Corporation through Kelly Services for $7.05 per hour; semi-skilled assemblers for Raltron Electronics Corp. for $7.25 per hour; unskilled full- and part-time couriers for Integrated Regional Laboratories at $9.40 per hour; a semi-skilled courtesy shuttle driver for Saturn of West Dade, wage unknown; unskilled machine operators for Equality Specialties for $5.50 per hour; and skilled watch repairer for Time Zone of Mia, Inc., at $5.50 per hour. Lange notified counsel for Gonzalez about the available positions by correspondence on January 5 and 11, 2001. The watch repairer position with Time Zone appears to require more formal education than Gonzalez had, based on the General Education Development requirements of Reasoning, Grades 9-12, and Math and Language, Grades 7-8. The job requirements for that and the other positions were submitted to Dr. Moya, who indicated by signing the job analyses on January 18 or 24, 2001, that Gonzalez was able to perform them. Between February 5 and February 9, Lange checked back with the employers, all of whom said there was no record of contact from Gonzalez except for Saturn of West Dade, which had hired another applicant. Lange concluded that Gonzalez' lack of effort prevented him from returning to work.

On cross examination, Lange indicated that she was not aware of Dr. Moya's deposition testimony when she performed her labor market survey. She did not speak to Dr. Moya; she simply mailed the Job Analysis forms to him for his review. She was aware that Dr. Moya and Dr. Rosabal had recommended that Gonzalez undergo a functional capacity evaluation, and has participated in those in other cases. She did not know why one was not performed in Gonzalez' case. She had not seen Dr. Ruddy's report before the hearing, and could not address the affect the findings in the March 2001 MRI had on Gonzalez' ability to function. Based on review of the hearing exhibits, Lange noted that in 1999, Gonzalez had been limited to lifting 30 pounds; in one report in 2001, he was limited to sedentary work lifting 10 pounds. She said that those additional restrictions would have affected his ability to perform some of the jobs she had identified. Later she said that she based her data primarily on what Dr. Moya said about Gonzalez' restrictions, rather than what Dr. Rosabal said. She considered the nine job openings she identified in January 2001 to be a significant number of jobs in the workforce of 900,000 in the area. At the time she testified, there were no current openings in any of the jobs she identified as available in January 2001. She agreed that Gonzalez has sustained a loss of wage earning capacity as a result of his injury to his right shoulder. Pay rates for the jobs she identified would have ranged from $5.00 to $6.82 per hour in 1998, as compared to the $11.00 per hour he made working for Sun Terminals.

Gonzalez countered Lange's testimony with the deposition of John Williams, taken July 18, 2001, together with his report. CX 1. Williams was retained to perform a vocational assessment of Gonzalez. Williams has a doctorate in counselor education with a specialization in rehabilitation counseling. He has practiced as a rehabilitationist for 22 years. He is a diplomate of

the American Board of Vocational Experts and the American Board of Disability Analysts. He is board certified as a Rehabilitation Counselor, a Case Manager and a generic Counselor. He is licensed in Florida as a rehabilitation provider, and in New Mexico as a mental health counselor. He has written 43 peer-reviewed journal articles, and two books on the standard of practice in the field of rehabilitation, one on assessment of earning capacity, and the other on rehabilitation. He has also written chapters for medical books in his field. He has been a college professor and physician trainer, and performs assessment, counseling, case management and expert testimony. He provides about half of his services for injured employees, and half for employers.

Williams reviewed the medical evidence to determine Gonzalez' functional capacity. He also met with him on June 19, 2001, to identify his education, work history, age, transferable skills, and subjective complaints and subjective limitations. He performed testing, including the Purdue Pegboard, for manual dexterity, and Spanish versions of the Wonderlic Personnel Test, for intellectual abilities, CAPS, for abilities and aptitudes, and COPS, for vocational interest. He reviewed Gonzalez' wage and employment records, and performed research to establish what employment existed in the labor market. He also reviewed the surveillance tapes, and Lange's records.

Williams stated that the most significant statement regarding Gonzalez' limitations was Dr. Moya's limitation of Gonzalez to sedentary work not requiring use of the right dominant upper extremity. He said that Dr. Rosabal did not provide insight into Gonzalez' limitations because the functional capacity assessment he recommended was never performed. Dr. Ruddy's evaluation of Gonzalez' limitations did not meet the standard of practice which could be interpreted by a rehabilitation expert, because his description of light duties with no activities above 90 degrees of forward flexion or abduction, and lifting of 20 to 30 pounds, without specifying which arm, provides insufficient information to use in determining earning capacity. The surveillance videos did not show activities that would correlate with the ability to function at work.

Williams described Gonzalez' employment repairing containers as "heavy" exertion work activity. The welding involved does not provide transferable skills. Although Gonzalez had a fifth grade education in Cuba, testing showed his educational ability at the eleventh grade level. He had no specific vocational training, and did not speak English. His Spanish language skills were average. He had very low numerical and clerical skills, low mechanical skills and was average in spatial relations. He tested from the fifth to the eleventh percentile in finger dexterity in his right hand, meaning that between 89 and 95 percent of the population are faster and more accurate. The Purdue Pegboard test of how both hands work with small objects put Gonzalez in less than the first percentile of assembly workers and up to nine percent of general factory workers. Williams thought Gonzalez would be unable to perform such work productively. Williams said Gonzalez had no skills that would transfer to sedentary employment, and lacked the education and bilingual language skills required for entry into semi-skilled or skilled work.

Williams reviewed Lange's reports. Jobs she identified were not consistent with Dr. Moya's restrictions because they required the ability to reach repetitively, grasp and manipulate,

either frequently or constantly. She had not conducted any standardized testing on Gonzalez as he had. He found discrepancies between her labor market survey and Gonzalez' age, education, transferrable skills, physical limitations and the nature of the labor market. Williams testified that Lange's survey did not meet the appropriate professional standards in the area of vocational re-employment assessment. Williams contacted each of the employers that Lange had. He had specific concerns about Gonzalez limited ability to use his dominant extremity, and his inability to speak English, with which the employers agreed. Summaries of his conversations appear in his report. Lange had the wrong DOT title for Gonzalez' work as a container mechanic, which also had some effect on the accuracy of her analysis. Williams said, "Ultimately every single one of [the employers] said, when I detailed his fine finger dexterity problems, limitations in the use of the right upper extremity and/or the English limitation, none of them would hire him." Deposition at 58. He testified that the position as a watch repairer was the most illustrative of Lange's lack of understanding of Gonzalez's physical limitations and lack of qualifications, because it takes a year or more of training as an apprentice, and requires fine finger coordination and dexterity. In addition, jobs identified by employment agencies such as Team Concepts are short term, menial jobs which do not represent long term stable employment.

In Williams' view, Gonzalez would have a difficult time obtaining sustained work. Unskilled work represents less than one percent of the 1.5 million-job labor market in South Florida. He did not think Gonzalez would be able to earn more than the equivalent of $5.50 to $7 per hour, for 20 hours per week, amounting to $110 to $140 per week. The combination of Gonzalez' limitation of use of his right arm, less than a high school education, inability to speak English and age all adversely affect his ability to obtain work.

Williams also evaluated Gonzalez' pre- and post-injury earning capacity. Based on his 1998 earnings, projected to a full year of work totaling $27,513.00, Williams calculated an average weekly wage of $529.10 per week.

On cross examination Williams said that Dr. Moya did not have complete information from Lange when he signed approval to the jobs she identified. He said that before he contacted the employers, he expected that they would say they would hire Gonzalez. In his view, the fact that Lange was able to identify so few jobs she thought Gonzalez could obtain reinforced his own position that Gonzalez would have a "tremendous problem" obtaining work. Deposition at 100. Williams confirmed that he made no independent search to find Gonzalez a job.

Suitable Alternative Employment

Weighing the testimony of Lange and Williams, I conclude that Williams' testimony is entitled to greater weight, and that the Employer/Carrier failed to establish the existence of suitable alternative employment by means of Lange's labor market survey. Williams has greater qualifications than Lange, and performed a vocational assessment of Gonzalez, which Lange did not. Williams provided well-reasoned, credible testimony which successfully challenged the validity of Lange's survey as it applied to Gonzalez. Williams rebutted Lange's testimony with

respect to each and every job she identified as available to Gonzalez. I found his critique of Lange's identification of the job of watch repairer as one available to Gonzalez particularly telling, in light of Gonzalez' physical limitations, limited education and work history. I also credit Williams' testimony that Lange's survey did not meet appropriate professional standards for vocational re-employment assessment. I conclude that Williams' opinion that the jobs identified by Lange were not truly available to Gonzalez because of his physical limitations and inability to speak English, is better supported by the evidence as a whole.

Although I have rejected the jobs identified by Lange as suitable alternative employment, I must also consider the fact that Gonzalez became employed before the hearing. Although counsel suggested that Williams' testimony could be the basis for a finding that Gonzalez would be unable to sustain work, I view that portion of Williams' testimony to be equivocal. Indeed, the job Gonzalez obtained is consistent with Williams' view that any work Gonzalez could obtain would be substantially less remunerative than his work before his injury.

I conclude that Gonzalez' job performing surveillance in a retail store for $180 per week constitutes suitable alternative employment and establishes that Gonzalez' disability is partial, rather than total.

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 to arrive at an average weekly wage. 33 U.S.C. § 910. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 343-344 (1992); *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 139 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543, 545-546 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244, 247-249 (1976), aff'd sub nom. *Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979). Sections 10(a) and 10(b) apply where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to subsection (c) if subsections (a) or (b) cannot be reasonably and fairly applied. In this case, the lengthy layoffs Gonzalez experienced show that his work for Sun Terminals was not regular and continuous. There is no evidence in the record regarding earnings of comparable employees. The parties have agreed, and I concur, that Section 10(c) should apply.

Section 10(c) is a general, catch-all provision applicable to cases where the methods at subsections (a) and (b) cannot realistically be applied. The objective of Section 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855, 859 (1982). That amount is then divided by 52, in accordance with Section 10(d), to arrive at the average weekly wage. All sources of employment income should be considered in a fair and reasonable determination of wage earning capacity. *Wayland*, 25 BRBS at 59; *Lobus v. I.T.O.*

Corp., 24 BRBS 137, 139 (1990); *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770, 777 (1977). Section 10(c) determinations will be affirmed if they reflect a reasonable representation of earning capacity and the claimant has failed to establish the basis for a higher award. *Richardson*, 14 BRBS at 859.

Unlike Sections 10(a) and (b), subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822-823 (5th Cir. 1991); *Tri-State Terminals v. Jesse*, 596 F.2d 752, 756 (7th Cir. 1979); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). It would be unfair to look only at the one year preceding the injury when the work is slow one year and then busy the next, or vice versa. *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987). In calculating annual earning capacity under Section 10(c), the judge may consider: the actual earnings of the claimant at the time of injury; the average annual earnings of others; the earning pattern of the claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commissions; the probable future earnings of the claimant; or any fair and reasonable alternative. The ALJ must arrive at a figure which approximates an entire year of work (the average annual earnings). That figure is then divided by 52, as required by Section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990). An administrative law judge calculating average annual earnings by considering the claimant's earning history over a period of years prior to the injury must take into account the earnings for all years during the period to reasonably represent the claimant's annual earning capacity. *Anderson*, 13 BRBS at 596.

Both parties based their calculations of the average weekly wage on Gonzalez' earnings from Sun Terminals. Claimant argues for an average weekly wage of $529.10, based on Gonzalez' 1998 earnings. Claimant's Closing Argument Brief; Claimant's Response to Employer/Carrier's Closing Argument Brief. Employer/Carrier, on the other hand, having paid compensation calculated from a rate of $317.37, argues for an average weekly wage of $317.89 to $320.43 based on Gonzalez' earnings during the 52 weeks before his injury, and calendar year 1997. Employer/Carrier's Closing Brief. Neither party included Gonzalez' prior earnings from Sun Terminal in their calculations.

The only earnings for Gonzalez documented in the record are wages from Sun Terminals and unemployment compensation. There is no information about his 1995 earnings, the year he started at Sun Terminals, but in any case, according to the testimony of the payroll custodian, he would have been paid at a lower rate during his three-month probationary period. I conclude that the fairest way to calculate the average weekly wage on this record is to add together Gonzalez' earnings from Sun Terminals for 1996 ($23,255.65), 1997 ($16,662.00), and 1998 ($10,582.00), for a total of $50,499.65, divide by the number of years, 2.42, for an average of $20,867.62 per year, and divide by 52, resulting in an average weekly wage of $401.30.

Wage Earning Capacity

Section 8(h) of the LHWCA provides:

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided*, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h).

Where the claimant seeks benefits for total disability and the employer establishes suitable alternate employment, the earnings established for the alternate employment show the claimant's wage-earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). The wage-earning capacity established by suitable alternate work applies from the date when the injury became permanent, i.e., the date of maximum medical improvement, and not from the time the claimant actually obtains suitable alternate employment. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989). Thus a claimant may become partially rather than totally disabled once he reaches maximum medical improvement and no longer receives treatment, regardless of the date the employer presents evidence of available alternate employment. *Berkstresser*, 16 BRBS at 234.

Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796-97 (D.C. Cir. 1984). If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. *Devillier*, 10 BRBS at 660. The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), aff'd sub nom. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180 (9th Cir. 1990); *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188, 190 (1985); *Spencer v. Baker Agric. Co.*, 16 BRBS 205, 208 (1984); *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983); *Bethard*

v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980).

I find that Gonzalez' actual wages of $180 per week reasonably and fairly represent his post-injury wage-earning capacity.

Section 14(e) Penalty

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, the employer shall be liable for an additional 10% penalty of the unpaid installments unless the employer files a timely notice of controversion as provided in § 14(d). 33 U.S.C. § 914(e). The penalty also applies if the employer pays compensation on the wrong average weekly wage, in which case the claimant is entitled to the mandatory assessment on the difference between his correct average weekly wage and the wage used by the Employer; or if the employer unilaterally suspends payment. *National Steel and Shipbuilding v. Bonner*, 600 F.2d 1288, 1294-1295 (9th Cir. 1979); *Ramos v. Universal Dredging Corp.*, 15 BRBS 140, 145 (1982); *Tezeno v. Consolidated Aluminum Corp.*, 13 BRBS 778, 783 (1981)*; McNeil v. Prolerized New England Co.*, 11 BRBS 576, 578-579 (1979); *Garner v. Olin Corp.*, 11 BRBS 502, 506 (1979). Thus, the 10% penalty of Section 14(e) applies on all installments due between May 28, 1998 and the date of the informal conference or the filing date of the form LS-207, whichever is earlier.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Canty v. S.E.L. Maduro*, 26 BRBS 147, 153 (1992); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom. Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The purpose of interest is not to penalize employers but, rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 47, 50 (1989). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). Claimant is not entitled to interest upon the additional compensation he will receive pursuant to section 14 (e). *Cox v. Army Times Publishing Co.*, 19 BRBS 195, 198 (1987).

Attorney Fees

Having successfully established his right to compensation, the Claimant's attorney is entitled to an award of fees under section 28(a) of the Act. 33 U.S.C. § 928(a); 20 CFR § 702.134(a); *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991). The Regulations address attorney's fees at 20 CFR §§ 702.132, 133 and 134. Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty days (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten (10) days following service of the application within which to file any objections. The Act prohibits the charging of a

fee in the absence of an approved application.

Conclusion

In summary, I conclude that Gonzalez reached maximum medical improvement on March 14, 2000. His average weekly wage for the purpose of calculating disability compensation was $401.30. The fact that Gonzalez successfully obtained employment in July 2001 at a lower rate of pay than he earned before his injury demonstrates permanent partial disability. His actual pay of $180 per week establishes his post-injury wage earning capacity. Employer/Carrier paid temporary total disability from May 29, 1998, to August 17, 1999, at too low a rate, and no compensation benefits thereafter. Gonzalez is entitled to an order for payment of lost compensation for temporary total disability from May 29, 1998, to March 14, 2000, and permanent partial disability benefits thereafter, with Section 14(e) penalties and interest, future medical expenses (if any), and attorney fees.

ORDER

The claim for benefits filed by Damaso Gonzalez is GRANTED. I therefore ORDER:

1. The Employer/Carrier shall pay temporary total compensation to Gonzalez for the period from May 29, 1998, to March 14, 2000, based on an average weekly wage of $401.30, at a compensation rate of $268.87 per week, in accordance with Section 8(b) of the LHWCA, 33 U.S.C. § 908(b). Employer/Carrier shall receive a credit for amounts paid from May 29, 1998 through August 17, 1999.

2. The Employer/Carrier shall pay permanent partial compensation to Gonzalez beginning March 15, 2000, at a compensation rate of $148.27 per week, in accordance with Section 8(c)(21) of the Act, 33 U.S.C. § 908(c)(21).

3. The Employer/Carrier shall pay additional compensation of 10% on compensation installments due after May 28, 1999, until the date of the informal conference or the filing date of the form LS-207, whichever is earlier, in accordance with Section 14(e) of the Act, 33 U.S.C. § 914(e).

4. Claimant is entitled to interest on accrued unpaid compensation benefits, other than Section 14(e) penalties. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

5. The District Director shall make all calculations necessary to carry out this order.

6. Employer/Carrier shall pay Gonzalez for all future reasonable and necessary medical care and treatment arising out of his work-related injury to his shoulder on May 21, 1998, pursuant to Section 7(a) of the Act, 33 U.S.C. 907(a).

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on Claimant and opposing counsel,

who shall have ten (10) days to file any objections.

A

Alice M. Craft
Administrative Law Judge